IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1360 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NIMISH KESHAVLAL PATEL

Versus

DENA BANK

Appearance:

NANAVATI ASSOCIATES for Petitioner

DR SONIA HURRA for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 4/09/2001

C.A.V. JUDGEMENT

1. Nimish Keshavlal Patel, petitioner, has filed this petition under Articles 226/227 of the Constitution of India challenging the order and directions dated 15.1.2001 issued by the Debt Recovery Tribunal

(hereinafter referred to as `DRT') directing the petitioner not to leave India without permission of the DRT and further to deposit his passport with respondent No. 2, DRT. The petitioner has prayed for this direction in a proceeding initiated by Dena Bank, respondent No. 1, in proceedings O.A. No. 371 of 2000.
2. The facts of the case are as under:

2.1 The petitioner is the Chairman and Managing Director of M/s. N.K. Industries Limited (hereinafter referred to as `the Company'). The said Company was incorporated on 19.8.1987 as a Private Limited Company, under the provisions of the Companies Act, 1956 and thereafter converted into a Public Limited Company. The said Company is engaged in the business of manufacturing and marketing of castor oil and its derivatives and is employing about 200 employees.

BACKGROUND OF THE MATTER:

2.2 It has been stated that due to reasons beyond control, the Company suffered huge losses in the year 1998-99 and consequently its networth has been eroded. The Company therefore made a Reference to BIFR (Board for Industrial and Financial Reconstruction) in terms of Section 15(1) of SICA (Sick Industrial Companies (Special Provision) Act, 1985) in 1999. Vide its order dated 9.7.1999, the Company was declared as Sick Industrial Company under Section 3(1)(o) of SICA by BIFR.

2.3 Being aggrieved and dissatisfied with the aforesaid order of BIFR, State Bank of India filed appeal by way of appeal to AAIFR (Appellate Authority of Institution of Finance Restructure) (hereinafter referred to the `Appellate Authority'). The appellate authority vide its order dated 15.2.2000/23.5.2000 allowed the appeal and dismissed the Reference made by the Company to be BIFR. Learned counsel for the Bank has also invited my attention to the order of the appellate authority in which the appellate authority has severely criticised the conduct of the petitioner in this behalf.

2.4 Being aggrieved and dissatisfied with the order of the appellate authority, the Company filed writ petition before this court under Articles 226/227 of the Constitution of India being Special Civil Application No. 8689 of 2000. The said matter was argued by the concerned parties before this court and the decision of this court is awaited by the parties concerned.

PRESENT CONTROVERSY:

2.5 It has been stated in the petition that after finalisation of the duly audited accounts of the Company for the financial year 1999-2000 the petitioner by his letter dated 15.5.2000 made a fresh Reference to BIFR under Section 15(1) of the SICA. BIFR vide its letter dated 16.11.2000 informed the Company that the said Reference is registered as Case No. 357 of 2000 with BIFR.

2.6 It has been stated that the respondent Bank was aware about the said proceedings. The Company also informed the Bank about the said proceedings.

2.7 It has been stated in the petition that in the meanwhile the respondent Bank filed recovery proceedings on 10.8.2000 for recovery of dues against the Company as well as guarantors including the present petitioner before the DRT, under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as `the DRT Act'). The said proceedings are numbered as O.A. 371 of 2000 before the DRT, Ahmedabad.

2.8 The Tribunal by its order dated 28.8.2000 by way of ex-parte injunction restrained the respondents from transferring or alienating their immovable properties described in Part A of Schedule I subject to first charge of IDB. DRT also issued directions to the respondents to maintain status quo with regard to their personal properties described B and Part C of Schedule I, page nos. 22 and 23. The Company was also directed to maintain status quo with regard to the hypothecated goods mentioned in Schedule II at page no. 23 and also directed the respondent (petitioner herein) from leaving India without prior permission of the DRT. DRT appointed Court Commissioners to make inventory of the assets, stocks, machineries, hypothecated and mortgaged securities and also inspect books of accounts.

2.9 Thereafter, on 15.1.2001 the applicant bank had filed an application before the DRT. The DRT vide its order dated 15.1.2001 observed that though it had passed order and directed the petitioner not to leave India without permission of it, petitioner had gone to Switzerland in the month of November, 2000 violating the order of DRT amounting to deliberate disobedience of the order of DRT and therefore directed the petitioner to deposit his passport with the DRT and DRT may initiate

action and punish the petitioner for deliberately disobeying order of the DRT under contempt of Courts Act, 1971. The DRT also perused the order of the appellate authority and ordered that the Manager of the applicant bank along with Shri N.K. Shah, advocate, are appointed as Jt. Commissioners to carry out the inventory of the assets, stocks, machineries, hypothecation and mortgaged securities. Report of the Court Commissioners be submitted within three weeks from the date of receipt of the warrant. The petitioner was also directed to deposit his passport before the DRT.

2.10 It appears that thereafter on 19.1.2001 the respondent bank moved another application at Exh. A/15 for posting of security guards at the factory premises of the company and the DRT passed order on 19.1.2001 permitting the respondent Bank to deploy its own security guards at the factory premises of the Company.

2.11 Thereafter, a notice for Court Commission work was served upon the petitioner on 19.1.2001. On 20.1.2001 the said Court Commissioner came to the factory premises of the Company and has taken the inventory and has performed other commission work, pursuant to the aforesaid orders dated 15.1.2001 and 19.1.2001.

2.12 On 25.1.2001 the Company filed its reply before the DRT objecting to the appointment of receiver.

2.13 The petitioner has also amended the petition and also challenged the order dated 28.8.2000 and also order dated 15.1.2001 on other grounds and prayed stay of the order dated 28.8.2000. The learned counsel has relied on various provisions of DRT Act and pointed out that under the provisions of the DRT Act, the Tribunal has no power and jurisdiction to direct the petitioner not to leave India without prior permission of the DRT and in any view of the matter DRT cannot pass order directing the petitioner not to leave India without its prior permission and to surrender the passport to DRT. The said action is de hors the provisions of the Act and no such power is not conferred on the Tribunal and therefore the said order of the Tribunal is without jurisdiction.

3. It has been stated in the petition that on 25.1.2001 the Company had filed a writ petition being Special Civil Application No. 749 of 2001 before this Court challenging the orders dated 15.1.2001 and 19.1.2001 passed by DRT. This court (Coram: D.A. Mehta, J) had on 1.2.2001 issued notice to the respondents making it returnable on 7.2.2001. On

7.2.2001, this court, after hearing the parties, passed an order whereby DRT was directed to decide the issue regarding jurisdiction first in view of Section 22 of SICA.

4. Thereafter, the Company filed an affidavit on 9.2.2001 before DRT and prayed for recall of the orders dated 15.1.2001 passed below Exh. A/13 and and 19.1.2001 below Exh. A/15 and also for stay of the further proceedings on the ground that the Reference of the Company was registered by BIFR on 16.11.2000.

5. It is also stated that on 9.2.2001 after the aforesaid affidavit was filed before DRT and arguments of the advocate of the company in support of its prayers for recalling the orders dated 15.1.2001 and 19.1.2001 were completed, advocate for the respondent Bank prayed for time to file a reply to the aforesaid affidavit. Thereafter, DRT accepted the request of the respondent Bank and adjourned the matter to 8.3.2001 to enable the bank to file its reply.

6. It appears that thereafter the Bank filed Misc. Civil Application No. 214 of 2001 on 9.2.2001 under the provisions of Contempt of Courts Act before this Court, seeking a prayer for punishing the petitioner for an alleged wilful and deliberate breach of order dated 15.1.2001 passed by DRT. The Division Bench of this court issued notice in the petition on 13.2.2001. The said proceedings are pending before this court.

7. The present petition was also filed on 22.2.2001 and this court issued notice. Ultimately this court on 12.4.2001 after relying on the judgment of the Supreme Court in the case of M/s. PATHEJA BROS FORGINGS & STAMPING AND ANOTHER VS. I.C.I.C.I. Ltd. reported in JT 2000 (8) SC 252, stayed operation of the order dated 15.1.2001 stayed operation of the order dated 15.1.2001 regarding direction to the petitioner to deposit his passport.

PETITIONER'S CONTENTIONS:

I. Contentions regarding Section 22 of SICA:

8. Mr. K.S. Nanavati, learned senior counsel, appeared on behalf of the petitioner. He stated that in view of provisions of Section 22 of the SICA proceedings before DRT are suspended and therefore DRT ought not to have continued proceedings after November 2000 when Reference before the BIFR was registered.

8.1 Learned counsel for the petitioner further relied on Section 22 of SICA which reads thus:

"Suspension of legal proceedings, contracts, etc.

(1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956(1) (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a Receiver in respect thereof (and no suit for the recovery of money or for the enforcement of any security against the industrial company or any guarantee in respect of any loans or advance granted to the industrial company) shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

8.2 Relying on these provisions of the Act, he submitted that in this case in August 2000 the Bank has initiated proceedings before the DRT and thereafter the DRT has passed order on 28.8.2000. He further submitted that in November, 2000 the Company has made a Reference before the BIFR and therefore in view of Section 22 of the Act, DRT has no jurisdiction to proceed further and the proceedings may be suspended. In support of the same the learned counsel has relied on the judgement of the Hon'ble Supreme Court in the case of REAL VALUE APPLIANCES LTD. VS. CANARA BANK reported in AIR 1998 SC 2064 in which at para 23 the Hon'ble Court has observed thus:-

"In our view, when Section 16(1) says that the BIFR can conduct the inquiry "in such manner as it may deem fit", the said words are intended only to convey that a wide discretion is vested in the BIFR in regard to the procedure it may follow for conducting an inquiry under Section

16(1) and nothing more. In fact, once the reference is registered after security, it is, in our view, mandatory for the BIFR to conduct an inquiry. If one looks at the format of the reference as prescribed in the Regulations, it will be clear that it contains more than fifty columns regarding extensive financial details of the Company's assets, liabilities, etc. Indeed, it will be practically impossible for the BIFR to reject a reference outright without calling for information/documents or without hearing the Company or other parties. Further, the Act is intended to revive and rehabilitate sick industries before they can be wound up under the Companies Act, 1956. Whether the Company seeks a declaration that it is sick or more other body seeks to have it declared as a sick company, it is, in our opinion, necessary that the Company be heard before any final decision is taken under the Act."

8.3 He has also relied on the judgement of the Hon'ble Supreme Court in the case of M/S. PATHEJA BROS. FORGINGS & STAMPING AND ANR. VS. I.C.I.C.I. LTD. AND ORS. reported in JT 2000(8) SC 252 in which at paras 7, 8 and 9 on pages 256-257 the Hon'ble Supreme Court has observed thus:

"Para 7 - The words in the square brackets above were inserted into Section 22 by Article 12 of 1994 and it is these words which are relevant for our purposes. As we read them, they provide that no suit

(a) for the recovery of money, or
(b) for the enforcement
(i) of any security against the industrial company, or

(ii) of any guarantee in respect of any loans or advance granted to the industrial company.

shall lie or be proceeded with except with the consent of the Board or the Appellate Authority under the said Act. Four our purposes, therefore, the relevant words are "no suit..... for the enforcement.... of any guarantee in respect of any loans or advance granted to the industrial company" shall lie without the consent of the Board or the Appellate Authority. The words are crystal clear. There is no ambiguity therein. It

must, therefore, be held that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the concerned industrial company will lie or can be proceeded with or without the sanction of the Board or the Appellate Authority under the said Act.

Para 8 - It is not possible to read the relevant words in Section 22 as meaning that only a suit against the industrial company will not lie without such consent. There is no requirement in Section 22, as analysed above, that, to be covered thereby, a suit for the enforcement of a guarantee in respect of a loan or advance to the industrial company should be against the industrial company.

Para 9 - Section 17(3) empowers the Board to direct the preparation of a scheme adopting all or any of the measures specified in Section 18. Section 18(2) states that the scheme may provide, inter alia, for "the continuation by, or against, the sick industrial company or as the case may be, the transferee company or any action or any other legal proceedings pending against the sick industrial company immediately before the date of the order made under Sub-section (3) of Section 17". The argument on behalf of the first respondent is that while this provision provides for the continuation of proceedings against the industrial company, there is no provision in the said Act which provides for the continuation of any held up proceeding against the guarantor of a loan or advance to such company and that, therefore, Section 22 should be read as applying only to a suit against the industrial company and not a guarantor. Apart from the fact that, as indicated above, the language of Section 22 is explicit, the scheme would provide for the repayment of the loan or advance and, therefore, would take within its ambit the claim on the guarantee, the question of proceeding with the suit against the guarantor would not arise. On the other hand, if the industrial company cannot be revived by a scheme, the embargo under Section 22 would cease to operate."

8.4 He has also relied on the decision of a Division Bench of this court (Coram: B.C. Patel and K.M. Mehta, JJ) in Company Petition No. 30 of 1993 decided on

17.12.1999 where provisions of Section 22 of SICA have been interpreted and the court has held on page No. 52 (concurring judgement of K.M. Mehta, J) as under:

"Answer to question No. 2(a): When an application before the BIFR is pending and subsequently winding up petition is filed in the High Court, the same is not maintainable at law.

2(b) When winding up petition is filed prior to the time to reference of the respondent company before the BIFR, the winding up petition shall remain suspended before the High Court.

2(c) If winding up petition is already filed and thereafter reference is made before the BIFR and thereafter if petitioner desired to continue winding up proceedings then he has to obtain permission from BIFR."

8.5 He therefore submitted in view of Section 22 of SICA and other decisions cited, the proceeding initiated by the bank must be suspended as the proceeding before the BIFR has been registered after the suit filed by the Bank. He further submitted that bank has not obtained permission from the BIFR for proceeding further.

II. Contentions regarding Provisions of the Debts Recovery Act:

8.6 The learned counsel for the petitioner has relied on certain provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 2 provides for definition. Section 2(g) provides for definition of debt. Section 17 provides for jurisdiction, power and authority of Tribunals. Section 17 reads thus:-

"(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institution for recovery of debts due to such banks and financial institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act."

8.7 Section 19 provides for application to the Tribunal. Sub-section (12) of Section 19 provides power of making interim order by the Tribunal. Sub-section (13)(A) provides power to furnish security, if the Tribunal is satisfied that the defendant, with intent to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him in connection with disposal of the property. Sub-section (13)(B) of Section 19 provides power of attachment in certain contingencies. Sub-sections (14), (15), (16) also provide power for attachment. Sub-section (17) provides that if there is disobedience of an order made by the Tribunal under sub-sections (12), (13) and (18) or breach of any of the terms on which the order was made, the Tribunal may order the properties of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Tribunal directs his release. Sub-section (18) provides for power of receiver. Sub-section (19) provides certificate of recovery be issued. The relevant Sub-sections (12), (13A), 13(B), (17) and (18) of Section 19 are reproduced as under:-

"Sub-sec. 12 - The Tribunal may make an interim order (whether by way of injunction or stay or attachment) against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of, any property and assets belonging to him without the prior permission of the Tribunal.

Sub-sec. 13(A) - Where, at any stage of the proceedings, the Tribunal is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him

(i) is about to dispose of the whole or any part of the property; or

(ii) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Tribunal; or

(iii) is likely to cause any damage or mischief to the property or affect its value by misuse or creating third party interest,

the Tribunal may direct the defendant, within a

time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the certificate for the recovery of debt, or to appear and show cause why he should not furnish security.

Sub-sec. 13(B) - Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Tribunal, the Tribunal may order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt.

Sub-sec. (17) - In the case of disobedience of an order made by the Tribunal under sub-section (12), (13) and (18), or breach of any of the terms on which the order was made, the Tribunal may order the properties of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Tribunal directs his release.

Sub-sec. (18) - Where it appears to the Tribunal to be just and convenient, the Tribunal may, by order, -

(a) appoint a receiver of any property, whether before or after grant of certificate for recovery of debt;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver;

(d) confer upon the receiver all such powers, as to bringing and defending suits in the courts or filing and defending applications before the Tribunal and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and

profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Tribunal thinks fit; and,

(e) appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof."

8.7(a) Section 20 provides for appeal to the Appellate Tribunal. The said section reads thus:-

"(1) - Save as provided in sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) - No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) - Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made, or deemed to have been made by the Tribunal, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed.

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) - On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) - The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) - The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and

endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal."

Section 22 provides for procedure and powers of the Tribunal and the appellate tribunal.

8.8 After relying on the aforesaid provisions of the Act, he submitted that the order of the Tribunal dated 28.8.2000 directing the petitioner not to leave India without permission of the DRT, there is inherent lack of jurisdiction in the Tribunal. The Tribunal is created under the Act. There is no power conferred on the Tribunal to direct the petitioner not to leave India without permission of DRT. He further submitted that in any view of the matter the Tribunal has no power to pass such order. Further by order dated 15.1.2001 the DRT has directed the petitioner to surrender his passport with the DRT which is also de hors the provision of law and the same is required to be quashed and set aside. He further submitted that in this case as the proceedings with the DRT are without jurisdiction, the present petition is maintainable at law.

The Tribunal has no jurisdiction to pass such order:

8.9 Mr. K.S. Nanavati, learned senior counsel for the petitioner, further submitted that the order passed by the DRT is clearly without jurisdiction and in support of the said contention he submitted that jurisdiction means authority to decide. Jurisdiction may be defined to be the power of a Court or Tribunal to `hear and determine a cause, to adjudicate and exercise any judicial or quasi judicial power in relation to it.' Thus, jurisdiction of a court means the extent of the authority of a court or Tribunal to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits.

8.10 He has further submitted that there is always distinction between want of jurisdiction and irregular exercise of it. However, if there is inherent lack of jurisdiction, the decree passed by a court is a nullity and that nullity can be set up in any collateral proceedings. However, if the court has jurisdiction but it is irregularly exercised, the defect does not go to the root of the matter and the error if any in exercising the jurisdiction can be remedied in appeal or revision and when there is no such remedy or is not availed of,

the decision is final.

8.11 In BUDHIA VS. GOPINATH (1999) 4 SCC 396, the Hon'ble Supreme Court, after referring to leading cases, stated: "A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceeding rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the orders passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation.

MAINTAINABILITY OF PETITION:

8.12 As regards maintenance of petition, he submitted that petition is maintainable at law. In support of the same the learned counsel has relied on the judgement of the Supreme Court in the case of INDUSTRIAL CREDIT AND INVESTMENT CORPORATION OF INDIA LTD. VS. GRAPCO INDUSTRIES LTD. AND OTHERS reported AIR 1999 SC 1975 wherein at paragraph 14 on page 1979 the Hon'ble Court has observed as under:-

> "There was no bar on the High Court to itself examine the merits of the case in the exercise of its jurisdiction under Article 227 of the Constitution if the circumstances so require. There is no doubt that High Court can even interfere with interim orders of the Courts and tribunals under Article 227 of the Constitution if the order is made without jurisdiction. But then a too technical approach is to be avoided. When facts of the case brought before the High Court are such that High Court can itself correct the error, then it should pass appropriate orders instead of merely setting aside the impugned order of the Tribunal and leaving everything in vacuum."

8.13 He has also relied on the judgement of this court passed in case of Spl. C.A. No. 131 of 2001 in case of CORE HEALTH CARE LTD. VS. STANDARD CHARTERED BANK AND ANOTHER on 23.1.2001 (Coram: D.A. Mehta, J) under the provisions of DRT where also the a contention was taken that the petition should not be entertained as appeal was provided under Section 20 of the DRT Act and once a statutory alternative remedy was provided this Court should not entertain the petition under Articles 226 or

227 of the Constitution of India. This court after considering the provisions of the DRT Act and after considering various judgements of the Supreme Court and another courts, in para 19, has observed as follows:

"On a careful consideration and analysis of the various decisions cited before us we find that the following legal propositions emerge:

(1) An interlocutory order is also an order which is appealable under Section 20 of the DRT Act.

(2) The power to issue a prerogative writ is plenary in nature.

(3) Such power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition or certiorari to ensure fundamental rights but also for `any other purpose'.

(4) The High Court having regard to the facts of the case has discretion to entertain or not to entertain the petition depending upon various facts and circumstances special to individual cases.

(5) The High Court having imposed upon itself certain restrictive fetters one of which is availability of alternative and efficacious remedy, would not normally exercise jurisdiction.

(6) However, availability of alternative remedy per se does not operate as a bar in all contingencies.

(7) Rule requiring exercise of alternative remedy is a rule of policy, convenience and discretion.

(8) The court should exercise jurisdiction under Article 226 / Article 32 taking note of legislative intent manifested by the provisions so as to be consistent with such provisions and not to frustrate them.

(9) The court should exercise jurisdiction to effectuate the regime of law as the power under Article 226 is meant to serve the ends of law and not to transgress the same.

DUTY TO GIVE REASONS:

8.14 Learned counsel for the petitioner submitted that `speaking order' means an order speaking for itself. To put it simply, every order must contain reasons in support of it. Giving of reasons in support of an order is considered to be the important principle of natural justice. According to this, a party has right to know not only the result of the inquiry but also the reasons in support of the decision. In support of the same, learned counsel has relied on the judgements of the Apex Court in the cases of M.P. INDUSTRIES VS. UNION OF INDIA reported in AIR 1966 SC 671 and SIEMENS ENGINEERING VS. UNION OF INDIA reported in AIR 1976 SC 1785. He submitted that in any view of the matter, when the DRT directed the petitioner not to leave India and also thereafter to deposit the passport, the order of DRT is bad on the ground that the DRT has not given any reasons.

8.15 He submitted that in the first place, duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion and the necessity of explaining why a decision is reached requires one to address one's mind to the relevant factors which ought to be taken into account. Secondly furnishing reasons satisfies an important desire on the part of the affected individuals to know why a decision was reached. Basic fairness requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit. Thirdly, rational criticism of a decision may only be made when the reasons for it are known. In other words, if the decision is to be challenged, reasons are necessary. It also provides an important basis for appeal or review. Giving of reasons enables courts and tribunals to effectively and meaningfully exercise their appellate or supervisory powers. (Learned counsel has relied on the article by Soli J. Sorabjee, namely the `Duty to Give Reasons in Administrative Law' given in the book of `Democracy Human Rights and the Rules of Law Essays in Honour of Nani Palkhivala at page 94)

RESPONDENTS' CONTENTION:

9. On the other hand Dr. Sonia Hurra, learned counsel for the Bank, has stated that in any view of the matter when there was already proceeding registered before the BIFR and the appellate authority has allowed appeal and thereafter petition is filed and arguments were over and the decision is awaited, registration of the Company's Reference before the BIFR is clearly an abuse of process of law.

9.1 The learned counsel has alternatively submitted that in any view of the matter in this case in August 2000 the bank has initiated proceedings and in November 2000 reference has been registered, so in any view of the matter if BIFR gives permission then the DRT can continue proceedings in this behalf. She has also pointed a letter in which it has been stated that there was a mention of proceedings before BIFR. She has stated that the order of the DRT is clearly legal and valid and therefore there was no bar of Section 22 of the SICA.

9.2 She pointed out order and stated that the proceedings were pending before the BIFR and at that time the office of the bank has invited attention to the earlier proceedings and also writ petition pending before the High Court. The BIFR has passed the order dated 21.6.2000. She has relied on para 5 of the order of the BIFR thus:

> "On a careful consideration of the matter, the Bench observed that unless the highly damaging orders of the AAIFR were set aside by any competent court, their findings and the strictures against the company and its promoters/management would remain valid. As reported by the company the matter was still under consideration of Ahmedabad High Court and no stay order had been granted. BIFR would therefore not like to proceed further with the case till such time as the final orders of Ahmedabad High Court regarding the company's earlier reference were available. In the meantime, keeping in view of the remarks of AAIFR, the recovery suits already filed against the company could proceed till such time as the judgement by the Ahmedabad High Court was announced. In case the company's writ petition was dismissed by Hon'ble Gujarat High Court, the suits would continue; otherwise, the Banks would have to move specific application before BIFR for continuation of permission u/s. 22(1) of the Act. The company shall file certified copies of the orders of Gujarat High Court with BIFR and all the secured creditors immediately on receipt."

9.3 In view of the same, BIFR has directed that now the Bank can institute suit before DRT. So present proceedings are legal and valid even as per Section 22 of the SICA.

9.3(a) It may be noted that the learned counsel for the petitioner stated that being aggrieved and dissatisfied with the aforesaid order, the petitioner has filed a separate petition being writ petition SCA No. 4883 of 2001 challenging the aforesaid action. I have already passed order dated 17.8.2001 in this behalf directing the Tribunal not to deliver final judgement till the judgement of this court in Spl. C.A. No. 8689/2000 is pronounced.

interim order is appealable:

9.4 She further submitted that even the interim order is also appealable before the Tribunal and the petitioner ought not to have rushed to this court by filing this present petition. She further submitted that in this case there is already an order dated 7.12.2000 directing the Tribunal to decide the matter and still the Tribunal has not decided the same and therefore in any view of the matter the present proceedings are premature.

9.5 In support of the aforesaid contention, she has relied on a Division Bench judgement of this court in the case of BANK OF INDIA VS. BARODA CABLES (PVT) LTD. reported in 1999(1) G.L.R. 381 wherein the Division Bench of this court has held that appeal would lie to the Appellate Tribunal against final orders and also against orders which are not final. She has relied on para 13 of the judgement.

> "Looking to the above provisions, there is no doubt in our minds that there is no provision in the Act stating that an appeal would lie before an Appellate Tribunal only when the order is final in nature. On the contrary, looking to the above provisions in their entirety, it is clear that any order passed by the Debt Recovery Tribunal is subject to challenge under Sec. 20 before the Appellate Tribunal. If it is so, the contention of Mr. Trivedi is well founded that the aggrieved party should approach the Appellate Tribunal for redress of grievance."

Alternative remedy:

9.6 The learned advocate for the bank submitted that the petitioner has challenged the order passed by the DRT. She submitted that the provision of Section 20 provides appeal to the Appellate Tribunal against the

said order. The petitioner has, therefore, equally efficacious remedy provided under the law. Therefore, this court may not exercise its jurisdiction under Article 226 of the Constitution. She further submitted that section 22 of the DRT Act provides for procedure and power of the Appellate Tribunal and Appellate Tribunal has power to examine the legality and validity of the order. In support of the same, she has relied on the decision of the Hon'ble Supreme Court in the case of TITAGHUR PAPER MILLS CO. LTD. AND ANOTHER VS. STATE OF ORISSA AND ANOTHER reported in AIR 1983 SC 603 in which at para 6 on page 605 the Hon'ble Supreme Court has observed as under:-

> "We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the prescribed authority under sub-s. (1) of Section 23 of the Act, then a second appeal to the Tribunal under sub-s. (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act."

9.6(a) The learned advocate for the bank has further relied on the decision of the Apex Court in the case of STATE OF HIMACHAL PRADESH VS. RAJA MAHENDRA PAL reported in AIR 1999 SC 1786 in which on page 1790 at para 6 the Hon'ble Supreme Court has observed as under:-

> "It is true that the powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature which can be invoked for the enforcement of any fundamental right or legal right but not for mere contractual rights arising out of an agreement particularly in view of the existence of efficacious alternative remedy. The Constitutional Court should insist upon the party to avail of the same instead of invoking the extraordinary writ jurisdiction of the Court."

As the order passed by the DRT is interim order, this court should not exercise jurisdiction under Article 226 of the Constitution:

9.7 She has further submitted that the transaction between the petitioner and the respondent is of a

commercial nature and the dispute between the parties standing as loan guarantor of loan advanced to the Company as well as to himself. She therefore submitted that the petitioner himself stands as a loan guarantor of the Company which has obtained loan and in his personal capacity as a guarantor has filed writ petition challenging the action of the bank to recover the amount. The learned counsel for the respondent Bank submitted that therefore the dispute between the petitioner and the respondent Bank raises disputed question of fact and this court may not decide the question in the writ petition. She has relied on the decision of the Hon'ble Supreme Court in the case of CENTRAL BANK OF INDIA VS. ROOPLAL BANSAL reported in (1999) 9 SCC 254 in which on page 255 at paragraph No. 6, the Hon'ble Supreme Court has observed as under:-

"In our opinion, the High court was not right in entertaining the writ petition. The transaction between the parties was purely a commercial one. Admittedly, the respondent had stood as guarantor in respect of the loans which had been advanced by the appellant. For the realisation of the amount, the appellant had filed a suit in a court of competent jurisdiction. If the respondent had any grievance in respect of the letter dated 7.10.1986, then the proper remedy available to the respondent was to file a Civil Suit and the High Court ought not to have entertained a writ petition under Article 226 of the Constitution especially when disputed questions of fact had to be gone into. On this ground alone, the judgement of the High Court is liable to be set aside."

9.7(b) She further submitted that in any view of the matter the order passed by the DRT is an interim order and is not a final order and therefore also this court may not exercise its jurisdiction under Articles 226/227 of the Constitution of India interfering with the said order. In support of this contention, the learned counsel has further relied on the decision of the Hon'ble Supreme Court in the case of KOYILERIAN JANAKI AND OTHERS VS. RENT CONTROLLER (MUNSIFF) CANNANORE AND OTHERS reported in (2000) 9 SCC 406 in which on page 409 at paragraph No. 4, it is observed thus:-

"Further we are in agreement with the argument of learned counsel for the appellant that it was not appropriate for the High Court to have interfered

with the order passed by the District Judge in exercise of its power under Article 227 of the Constitution. The proceedings in the present case arose under a special Act governing the landlord and tenant relationship and disputes. The Act does not provide any second appeal or revision to the High Court. The purpose behind for not providing such remedy is to give finality to the order passed under the Act. The power under Article 227 is exercisable where it is found by the High Court that due to a certain grave error an injustice has been caused to a party. For this reason also, the judgement of the High Court deserves to be set aside."

9.7(c) Learned counsel for the respondent further relied on the judgement of the Hon'ble Apex Court in the case of ASHOK KUMAR AND OTHERS VS. SITA RAM reported in (2001) 4 SCC 478 in which on page 481 at para 10 the Hon'ble Supreme Court has observed thus:-

"The position is too well settled to admit of any controversy that the finding of fact recorded by the final court of fact should not ordinarily be interfered with by the High Court in exercise of writ jurisdiction, unless the Court is satisfied that the finding is vitiated by manifest error of law or is patently perverse. The High Court should not interfere with a finding of fact simply because it feels persuaded to take a different view on the material on record."

MERITS OF THE MATTERS:

10. On the merit of the matter the learned counsel for the bank submitted that in view of the power conferred on the Tribunal by various sections particularly, Section 19 in various clauses, the Tribunal has power to issue injunction, power to attach property and also by order in writing fix any breach or disobedience of the order of the Tribunal, the Tribunal has power to detain any person in civil prison for a term not exceeding three months. The learned counsel for the bank therefore submitted that in this case initially the Tribunal has already passed order on 28.8.2000 directing the petitioner not to leave India without permission of DRT. That order was passed with a view to see that the bank can realize its debts from the petitioner in this behalf. The order of the Tribunal was perfectly reasonable and if the petitioner wanted to go to abroad, he should have filed an application before the DRT for

permission to go abroad and the Tribunal might have given permission. Looking to the facts of the case, however, the petitioner has not filed application but in complete disobedience of the order of the DRT, he has gone to Switzerland in November without obtaining permission. The learned counsel submitted that it has been alleged by the bank that the petitioner is trying to siphon away the fund of the company and in that situation, even if the Tribunal passes any order in favour of the bank and against the petitioner, the bank may not be able to realize its debts from the petitioner and that will be only a paper decree. The learned counsel for the bank submitted that the petitioner is trying to defeat the provisions of the said Act with a view to achieve the object. Therefore, the Tribunal initially passed order directing the petitioner not to leave India without its permission but when the petitioner did not obey the order of the Tribunal, the Tribunal was perfectly justified in passing the order that the petitioner must deposit the pass-port with the DRT. The learned counsel for the bank therefore submitted that the Tribunal was perfectly justified in passing the said order.

11. Learned counsel submitted that in any view of the matter when the petitioner has defrauded the bank and obtain huge amount by way of loan and when the petitioner has not paid any amount to the bank and bank has filed proceedings before BIFR, DRT is perfectly justified in directing that the petitioner should not leave India because DRT is of the view that if the petitioner is allowed to go foreign country he will not return or manipulate his account books and ultimately if decree is passed the same will be paper decree and when the order has not been complied with DRT was pleased to pass order directing the petitioner to surrender his passport. She stated that this order is incidental to the power of the DRT to protect the interest of the bank and the same is legal and valid.

12. The respondent Bank has also filed an application No. 5296 of 2001 on 1.5.2001 for vacating stay granted by the order dated 12.4.2001 and also disposal of the petition. She has further submitted that in this case large amount is due and payable by the petitioner to the Bank and other financial institution and the petitioner is siphoning away of the funds of the company and also diverting the same fund to the sister companies with a view to jeopardise the interest of the bank and the financial institution. It was also stated that the petitioner desires to go abroad and to put certain money of the company in a foreign bank so that ultimately even

if decree is passed in favour of the bank and against the petitioner the same cannot be executed and the same will be paper decree. The bank realizes that the petitioner desires to go to abroad and therefore DRT passed order that if the petitioner desires to go abroad he must take prior permission. However, the said order was passed on 18.8.2000. However, it appears that in December without prior permission of the DRT the petitioner went to Switzerland. In view of the same, the Tribunal was pleased to pass order on 15.1.2001 that the petitioner is directed to surrender his passport before the DRT. The learned counsel for the bank submitted that in view of this development order of the DRT directing the petitioner to surrender his passport is perfectly legal and valid and the same falls within the incidental power of the Tribunal provided under the provisions of the DRT Act.

13. Learned counsel for the bank further submitted that when this court passes order dated 7.2.2001 directing DRT to hear the matter on merits of the matter and even though the same is not heard before the DRT on merits still the petitioner filed the present petition on 22.2.2001 which is clearly an abuse of process of law and therefore this Court should not entertain the petition of the petitioner under Article 226/227 of the Constitution.

CONCLUSION:

14. I have gone through the record of the case. I have also considered the contentions raised both by the learned counsel for the petitioner and the learned counsel for the bank and also the authorities cited by them in support of their contentions. In my view the DRT has passed order which is an interim order and even then an appeal can be filed against the same under the provisions of the Act. In my view, in the light of the judgements of the Hon'ble Supreme Court in the case of CENTRAL BANK OF INDIA (supra), KOYILERIAN JANAKI AND OTHERS (supra) and ASHOK KUMAR & OTHERS (supra) where the Hon'ble Supreme Court has held that when alternative efficacious, statutory remedy is provided under the Act and when the orders are interim orders, the High Court should not interfere with the orders under Article 226 of the Constitution, the petition is not maintainable at law and the petitioner should be relegated to appellate authority.

14(i) I have also considered judgements of the Hon'ble Supreme Court in the cases of Industrial Credit and Investment Corporation of India Ltd (supra), Titaghur

Paper Mills Co. Ltd. (supra) and Budhia Vs. Gopinath (supra). In my view, the petition raises disputed questions of fact in the realm of Commercial Law, namely, in relation to Banking Laws. From the peculiar facts and circumstances of the case, it is not possible for this court to pass appropriate order in place of the order passed by the DRT at this stage and therefore it will not be possible for me to exercise jurisdiction under Articles 226/227 of the Constitution of India for quashing and setting aside the order of the DRT. In my view DRT has power to hear and determine the case and adjudicate the dispute between the petitioner and the respondents. Therefore, I do not accept the contention of the learned counsel for the petitioner that there is inherent lack of jurisdiction in the Tribunal in passing the order in view of several provisions of the Act which I have referred to earlier. In view of this peculiar facts and circumstances of the case, I feel that if the petitioner is relegated to the remedy provided under the Law where statutory appeal is provided under the provisions of the Act for filing the appeal before the appellate authority, the appellate authority has ample power and jurisdiction to decide all facts including legality and validity of the order passed by the DRT dated 15.1.2001 and law, particularly Section 20 of the Act which provides filing of appeal. As the orders passed by the DRT on 15.1.2001 are interim orders and in view of the judgement of this court the same are appealable, if the petitioner files appeal the appellate authority can decide the same in accordance with law. In my view the petitioner has equally, efficacious, convenient remedy provided under the law and therefore I do not want to exercise the discretionary, extraordinary jurisdiction under Articles 226/227 of the Constitution of India at this stage.

14(ii) In this case there is one more reason by which I do not intend to exercise discretionary, extraordinary jurisdiction under Articles 226/227 of the Constituion of India because I have narrated the contentions of the petitioner as well as the contention of the respondents on facts of the matter in detail. The adjudication and determination of the said question raise disputed question of facts and also interpretation of DRT Act. In my view, instead of this court, the appellate authority is the proper authority to adjudicate and decide both the question of fact and law raised in this petition. There is no compelling reason and there is no violation of fundamental rights of the petitioner and there is no violation of rules of natural justice in this case. In

view of the same, I direct that the petitioner will be relegated to the statutory remedy provided under the law.

14(iii) In view of the aforesaid position, if the petitioner files appeal before the appellate authority, the appellate authority will consider the same on merits without considering the limitation provided under the Act for filing of the appeal. The appellate authority will consider all the contentions raised by the petitioner in this behalf including the contentions raised before me and any other contentions that may be raised by the petitioner as well as the respondent in this behalf. As the petitioner raises various disputed question of fact and law, I direct that if appeal is filed by the petitioner, the appellate authority will consider the same in accordance with law. As this court has not decided the matter on merit, the appellate authority will not be influenced by the order of this court and will decide the appeal independently.

15. I hope and trust that the Appellate authority will allow both the parties to produce oral and documentary evidence in support of their contentions and thereafter pass a short but speaking order in this behalf. I have not decided the matter on merits since I am remanding the matter to the Appellate Authority. The Appellate Authority will consider all the contentions raised in this petition as well as the contentions raised before this court.

16. In view of the above observation, this petition is disposed of with no order as to costs. Interim relief granted earlier stands vacated.

(K.M. MEHTA, J)
(pkn)

After pronouncement of the judgement, Mr. P. Mehta, learned advocate on behalf of M/s. Nanavati Associates, prays that this court (Coram: Kundan Singh, J) by his order dated 12.4.2001 was pleased to pass an order staying the order of the DRT dated 15.1.2001. He submitted that the said order dated 12.4.2001 is continued during the pendency of the petition till date and the same may be continued for further three weeks from today. He submitted that this court has directed that the petitioner can file appeal and if the stay order is not continued, the remedy provided under the Act for filing appeal will be frustrated. He submitted that the

petitioner will try to obtain order from the appellate authority in this behalf as early as possible. For this purpose, Mr. P. Mehta, learned advocate on behalf of M/s. Nanavati Associates prays for time for three weeks. The learned counsel for the respondent has vehemently objected to the same.

In view of the above situation, interim relief granted earlier on 12.4.2001 staying the order of the DRT dated 15.2.2001 is ordered to be continued till 17.9.2001.

Date: 4.9.2001 (K.M. MEHTA, J)

(pkn)